

Walking the Line: Rails-to-Trails Conversions and *Preseault v. Interstate Commerce Commission*

I. INTRODUCTION

Recently, the public's consciousness of fitness and health matters has combined with concerns over energy sufficiency and pollution to push the concept of recreational trail systems to the political forefront. This is reflected in a body of federal legislation—including the Trails Act Amendments—and corresponding state statutes. These laws permit conversion of soon-to-be-abandoned railroad rights-of-way for recreational trail use. As with most other endeavors, conflicting positions as to the necessity, propriety, and cost allocations associated with rails-to-trails conversions arose. This Note will examine the important issues associated with implementing this policy. First, this Note will give an overview of the federal statute and relevant procedures. Second, this Note will examine the constitutional challenges recently dealt with by the Supreme Court in *Preseault v. Interstate Commerce Commission*. Third, an examination of state case law will illustrate the crucial position played by state property law. Fourth, a comparison of state rails-to-trails statutes will demonstrate different approaches taken regarding trail conversions. Fifth, the decisions of federal circuit courts will be analyzed in light of *Preseault*. Sixth, the competing policy and economic interests in the rails-to-trails debate will be contrasted. Finally, the prospects for rails-to-trails conversions will be examined.

II. TRAILS ACT AMENDMENTS AND PROCEDURES

A. Predecessor Statutes

In order to meet the increasing needs of the public for recreation and access to natural and historical resources, Congress passed the National Trails System Act in 1968—the original predecessor to the Trails Act Amendments.¹ The Act emphasized providing trails with access to urban and scenic areas.² To aid in the administration of the Act, this national system of trails utilizes nonprofit organizations and other volunteers in planning, development, maintenance, and management of trails.³

In addition to sections dealing with the National Trails System, the Act promotes the development of trails at the state and local level. The Secretary of

¹ National Trails System Act of 1968, Pub. L. No. 90-543, 82 Stat. 919 (codified as amended in 16 U.S.C. §§ 1241–1251 (1988)).

² *Id.* § 1241(a).

³ *Id.* § 1241(c).

the Interior exercises the primary responsibility "to encourage States, political subdivisions, and private interests, including nonprofit organizations, to establish such trails."⁴ The Secretary of Housing and Urban Development and the Secretary of Agriculture also have responsibilities to encourage the creation of trails.⁵

The Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act) was a subsequent congressional attempt to promote trail use of railroad rights-of-way.⁶ One provision permitted the ICC to impose a 180-day waiting period on sales and other transactions involving railroad properties "suitable for public purposes," unless nongovernment sale offers were first made for similar recreational purposes.⁷ A second set of provisions provided for exchanging information and expertise with private groups and government agencies.⁸ A third set of provisions appropriated funds to acquire and develop rights-of-way for trail and other recreational uses.⁹ Annual funding grew from six million dollars in 1976 to ten million dollars in 1983.¹⁰ A final provision, a forerunner of the present Trails Act Amendments, initiated a study of alternate uses of abandoned rights-of-way.¹¹

Both the National Trails System Act and the 4-R Act sought to encourage the conversion of abandoned railroad rights-of-way to recreational trails through financial and other assistance to governmental agencies.¹² From its 1920 peak of 272,000 miles, America's rail system declined to 141,000 miles by 1990. Estimates place future losses at 3000 miles annually.¹³ Congress hoped that these measures would stem the disappearance of rights-of-way.¹⁴ These measures, however, proved to be inadequate.¹⁵

B. National Trails System Act Amendments of 1983

In response to the inadequacy of the Trails System Act and the 4-R Act, Congress passed the Trails Act Amendments in 1983.¹⁶ Under the Trails Act

⁴ *Id.* § 1247(a).

⁵ *Id.* § 1247(b)-(c).

⁶ Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, Pub. L. No. 94-210, 90 Stat. 144 (codified as amended at scattered sections of 5, 11, 15, 31, 45, 49 U.S.C.).

⁷ 49 U.S.C. § 10906 (1988).

⁸ *Id.* at note (Conversion of Abandoned Railroad Rights-of-Way).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* See Pub. L. No. 94-210, 90 Stat. 144-45 for complete text.

¹² *Preseault v. ICC*, 494 U.S. 1, 5-6 (1990).

¹³ *Id.* at 5.

¹⁴ *Id.*

¹⁵ *Id.* at 6.

¹⁶ *Id.* 16 U.S.C. § 1247(d) (1988).

Amendments, the Secretary of Transportation, the Secretary of the Interior, and the Chairman of the Interstate Commerce Commission have the responsibility of encouraging state and local governments as well as private organizations to reach agreements with the railroads for interim trail uses.¹⁷ If these governments and organizations agree to assume complete responsibility for maintenance, legal liability, and taxes concerning a right-of-way, the ICC will transfer the right-of-way for conversion to trail use.¹⁸ The most controversial aspect, though, prevents the reversionary interests of adjoining landowners from vesting. The critical provisions dealing with the rails-to-trails conversions are as follows:

Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way . . . , if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.¹⁹

C. ICC Procedures

According to the Trails Act Amendments, certain steps must be taken before a railroad right-of-way can be converted to interim trail use. First, any interested governments or organizations must file with the ICC a comment or petition expressing this interest.²⁰ This comment or petition should include the following: A map and description of the right-of-way; a statement of willingness to assume complete responsibility for management, legal liability, and taxes; and a statement acknowledging that trail use is subject to management responsibilities and future resumption of rail service.²¹ In "regulated" proceedings, the comment is due within thirty days after the railroad files an abandonment application; in "exemption" proceedings, a petition must be filed within ten days after the Federal Register publishes the

¹⁷ 16 U.S.C. § 1247(d) (1988).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 49 C.F.R. § 1152.29(a) (1991). In "regulated" proceedings, abandonments follow procedures set forth in 49 U.S.C. § 10904. In "exemption" proceedings, certain abandonments (defined in 49 U.S.C. § 10505(a)) follow simplified procedures. *See generally* CHARLES H. MONTANGE, *PRESERVING ABANDONED RAILROAD RIGHTS-OF-WAY FOR PUBLIC USE: A LEGAL MANUAL* 19-31 (1989).

²¹ 49 C.F.R. § 1152.29(a)(2)-(3).

Notice of Exemption.²² Despite these rigid deadlines, the ICC has been flexible in accepting late requests.²³

Second, the ICC issues a Certificate or Notice of Interim Trail Use (CITU/NITU) if the railroad intends to reach a trail-use agreement. Thirty days after the CITU/NITU is issued, the railroad may discontinue service and salvage equipment. If an agreement has not been reached within 180 days after the CITU/NITU was issued, the railroad may abandon the right-of-way.²⁴ The ICC, however, will extend the six-month negotiation period at the parties' request, even in the face of landowner objections.²⁵ If the railroad does not intend to negotiate an agreement, a normal certificate of abandonment or exemption notice is issued. Even then, a CITU/NITU can later be issued if the railroad changes its mind and decides to negotiate.²⁶

III. *PRESEALT V. ICC*

Preseault v. Interstate Commerce Commission concerns an assertion that the Trails Act Amendments violate the Commerce Clause as well as the Fifth Amendment, which requires compensation for a taking of property for public use.²⁷ The taking question arises in many instances of conversion, because railroad rights-of-way frequently take the form of easements or similar property interests, which will revert to the adjoining landowner when abandonment as to rail use takes place.²⁸ The Trails Act Amendments prevent a reversion of property interests, which would otherwise take place under state law.²⁹

A. *Facts of Preseault*

In *Preseault*, the owners of land adjoining a right-of-way brought a quiet-title action in the Superior Court of Chittenden County, Vermont, based on a claim that abandonment of the right-of-way had caused it to revert to them.³⁰ The court, based on the lack of an ICC authorization of abandonment,

²² *Id.* § 1152.29(b)(1)-(2).

²³ *Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246, 1261 (D.C. Cir. 1988).

²⁴ 49 C.F.R. § 1152.29(c)-(d).

²⁵ *Policy Statement on Rails-to-Trails Conversions*, ICC, Jan. 29, 1990, available in WL, FTRAN-ICC Database [hereinafter *Policy Statement*].

²⁶ 49 C.F.R. § 1152.29(c)-(d).

²⁷ *Preseault*, 494 U.S. at 4. Article I of the United States Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States" U.S. CONST. art. I, § 8, cl. 3. The Fifth Amendment to the United States Constitution declares "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

²⁸ *Preseault*, 494 U.S. at 8.

²⁹ *Id.* at 8.

³⁰ *Id.* at 9.

dismissed the action. On appeal, the Vermont Supreme Court affirmed the lower court ruling.³¹ The landowners then requested a certificate of abandonment from the ICC. The State of Vermont and the railroad, however, intervened to petition the ICC to transfer the right-of-way to the City of Burlington for trail use.³² The ICC subsequently granted the petition and denied the landowners' motion to reconsider or clarify.³³

The landowners appealed the ICC's decision to the Court of Appeals for the Second Circuit, claiming a violation of the Takings Clause of the Fifth Amendment and of the Commerce Clause.³⁴ The Court of Appeals rejected the Fifth Amendment argument, stating that no taking had occurred, because a reversion does not vest until the ICC declares that the right-of-way has been abandoned. The court also rejected the Commerce Clause argument, finding that Congress' stated goals in encouraging trail development and preserving rights-of-way for future rail use were proper.³⁵ The landowners appealed to the United States Supreme Court, which granted certiorari.³⁶

B. Constitutional Issues

The takings problem dealt with in *Preseault* involves two distinct issues. The first concerns the propriety of congressional rails-to-trails legislation as it relates to the Commerce Clause. The second concerns the need to compensate for a taking of property in implementing the legislation. As Justice Brennan noted in *Preseault*, "The [Fifth] Amendment 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'"³⁷ In the concurring opinion, Justice O'Connor made this distinction as follows: "The scope of the Commission's authority to regulate abandonments, thereby delimiting the ambit of federal power, is an issue quite distinct from whether the Commission's exercise of power over matters within its jurisdiction effected a taking of petitioners' property."³⁸

1. Commerce Clause

In regard to the Commerce Clause, the Court held that enactment of the rails-to-trails legislation was a proper exercise of congressional power. The

³¹ *Id.*

³² *Id.*

³³ *Id.* at 9-10.

³⁴ *Id.* at 10.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 11 (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987)).

³⁸ *Id.* at 22 (O'Connor, J., concurring).

Court determined that the legislation's dual purposes of promoting recreational trail development and of preserving rights-of-way for future railroad uses (*i.e.*, "rail banking") fell within the scope of the commerce power.³⁹ Although the petitioners claimed that the rail-banking purpose was only a pretext to create the trails, the Court observed that, even if this were true, the legislation need only serve one valid purpose.⁴⁰

The Court reiterated its use of the traditional rational basis test for Commerce Clause cases. That is, if Congress has a rational basis in believing that a matter affects interstate commerce, court review is limited to ensuring a rational relationship between the legislation and the desired ends.⁴¹ Furthermore, the existence of alternatives that might be more effective does not invalidate the measures actually chosen by Congress.⁴²

2. *Compensation Under the Fifth Amendment*

As to the compensation question, the Court stated that the rails-to-trails amendment did not preclude compensation for any takings that actually arose.⁴³ The Court did not address whether, in this instance, there was a taking requiring compensation. No denial of compensation for a government taking of property occurred, because no claim for compensation was ever made pursuant to the Tucker Act.⁴⁴

The Tucker Act gives the United States Claims Court jurisdiction over "any claim against the United States founded either upon the Constitution, or an Act of Congress or any regulation of an executive department."⁴⁵ The district courts also have jurisdiction over these claims, if the amounts involved do not exceed 10,000 dollars.⁴⁶ Contrary to the Preseaults' argument, the Court noted that the omission of an explicit legislative reference to the Tucker Act did not preclude that remedy.⁴⁷ Because compensation claims could be pursued under the Tucker Act, the Preseaults' failure to do so rendered their Fifth Amendment challenge premature.⁴⁸

³⁹ *Id.* at 18-19.

⁴⁰ *Id.*

⁴¹ *Id.* at 17 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981)).

⁴² *Id.* at 19.

⁴³ *Id.* at 13.

⁴⁴ *Id.* at 17.

⁴⁵ 28 U.S.C. § 1491(a)(1) (1988).

⁴⁶ *Id.* § 1346(a)(2).

⁴⁷ *Preseault*, 494 U.S. at 13.

⁴⁸ *Id.* at 17. The Preseaults subsequently filed suit in the United States Claims Court. On January 8, 1992, the court granted partial summary judgment for the Preseaults. The court held the following: First, the property rights at issue were easements; second, the Preseaults possessed the reversionary rights underlying the easements; and third, the

IV. DEFINING PROPERTY RIGHTS

Whether a governmental action constitutes a public-use taking requiring compensation largely depends on the operation of state law. This is because state law defines the property rights that are subject to the coverage of the Fifth Amendment.⁴⁹ Even a short-term invasion of property rights may constitute a taking. In *First English Evangelical Lutheran Church v. County of Los Angeles*, the United States Supreme Court declared that “‘temporary’ takings . . . are not different in kind from permanent takings, for which the Constitution clearly requires compensation.”⁵⁰ In this light, the Court in *Preseault* did not accept the reasoning of the circuit court, which believed that the ICC’s authority over railroad abandonments affected the reversionary interests themselves.⁵¹ Justice O’Connor stated that “[t]he Commission’s actions may delay property owners’ enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights.”⁵² Furthermore, the Supreme Court appeared to suspect the circuit court’s emphasis that a reversionary interest had not come to fruition.⁵³ As the *Restatement of Property* says, if an event triggering a reversionary interest will probably occur in a short period of time, the property in question should be treated as a fee simple absolute estate for eminent domain purposes.⁵⁴

Thus, the property interests involved under state law must be defined before it is possible to answer the question of whether or not a rails-to-trails conversion constitutes a taking. If the railroad owns a right-of-way in fee simple absolute, the takings question does not arise. If, however, the railroad

easements were abandoned and extinguished under Vermont law, triggering the reversionary interests. Whether or not the Trails Act Amendments pre-empted the Preseaults’ reversionary rights remains to be decided. *Preseault v. United States*, 24 Cl. Ct. 818 (1992).

⁴⁹ *Id.* at 9; see also *id.* at 20 (O’Connor, J., concurring).

⁵⁰ *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987).

⁵¹ *Preseault*, 494 U.S. at 23–24 (O’Connor, J., concurring).

⁵² *Id.* at 22 (O’Connor, J., concurring).

⁵³ *Id.* (O’Connor, J., concurring) (citing *National Wildlife Fed’n v. ICC*, 850 F.2d 694, 704–05 (D.C. Cir. 1988)).

⁵⁴ RESTATEMENT OF PROPERTY § 53 cmt. c (1936). Compare *Hemphill v. Miss. State Highway Comm’n*, 145 So. 2d 455 (Miss. 1962) (probability test used) and *Chew v. Commonwealth*, 161 A.2d 621 (Pa. 1960) with *People ex rel. Dep’t of Pub. Works v. City of Fresno*, 26 Cal. Rptr. 853 (Cal. Ct. App. 1963) (mere possibility of reversion is insufficient to establish probability of reversion).

holds the right-of-way as an easement or similar property interest, the state law definition of an abandonment is crucial.⁵⁵

With this in mind, Congress passed the rails-to-trails amendments with the hope of minimizing takings that would require compensation.⁵⁶ The ICC interpreted its statutory authority as not including the power to force the railroads to reach trail-use agreements.⁵⁷ Even though this hope of avoiding takings problems has not been completely realized, the ICC's interpretation furthered the goals of avoiding takings disputes (at least in relation to the railroads' property interests).⁵⁸

Property rights regarding easements for railroad rights-of-way vary across the United States, the differences being dependent on variances in state law and the nature of the easements involved.⁵⁹ The following cases indicate the split among the states as to whether rails-to-trails conversions constitute abandonments of railroad rights-of-way.

A. *Rails-to-Trails Conversions Are Not Abandonments in Some States*

Two cases have held that a right-of-way conversion under a state's rails-to-trails statutes did not constitute an abandonment by the railroad. In *Rieger v. Penn Central Corp.*, an Ohio court of appeals held that such a conversion under section 1519.02 of the Ohio Revised Code did not constitute an abandonment of the right-of-way.⁶⁰ As the court noted, both uses of the easement involved "a public way to facilitate the transportation of persons and property."⁶¹

In *State by Washington Wildlife Preservation, Inc. v. State*, the Minnesota Supreme Court similarly held that a conversion under sections 84.209 and 85.015 of the Minnesota statutes did not constitute an abandonment.⁶² As the court stated, "The right-of-way is still being used as a right-of-way for transportation" ⁶³ Significantly, both of these decisions concerned

⁵⁵ *Preseault*, 494 U.S. at 8.

⁵⁶ *Id.* at 8 (quoting H.R. REP. NO. 98-28, 98th Cong., 1st Sess. 8-9, reprinted in 1983 U.S.C.C.A.N. 112, 119-20).

⁵⁷ *Policy Statement*, *supra* note 25.

⁵⁸ *Washington State Dep't of Game v. ICC*, 829 F.2d 877, 881-82 (9th Cir. 1987).

⁵⁹ *National Wildlife Fed'n v. ICC*, 850 F.2d 694, 706 (D.C. Cir. 1988).

⁶⁰ *Rieger v. Penn Central Corp.*, No. 85-CA-11 (Ohio Ct. App. Greene County May 21, 1985) (LEXIS, States library, Ohio file). See also *infra* notes 96-98 and accompanying text.

⁶¹ *Id.* (quoting *Hatch v. Cincinnati & Ind. R.R.*, 18 Ohio St. 92, 122 (1864)).

⁶² *State by Wash. Wildlife Preservation, Inc. v. State*, 329 N.W.2d 543, 544 (Minn. 1983). See also *infra* notes 99-101 and accompanying text.

⁶³ *Washington Wildlife Preservation*, 329 N.W.2d at 547.

prescriptive easements. In cases dealing with easements explicitly limited by contract or statute to railroad use, courts consistently find abandonments.⁶⁴

B. *Rails-to-Trails Conversions Are Abandonments in Some States*

Despite the holdings of Ohio and Minnesota cases, a number of state courts have taken exactly the opposite approach in handling interim trail conversions that involve railroad easements. *Pollnow v. State Department of Natural Resources* also concerned a prescriptive easement, but the Supreme Court of Wisconsin held that the easement was for railroad purposes only. As this court declared, "The majority rule is that a railroad company acquires by prescription or adverse possession only an easement in a right of way."⁶⁵ Because the easement reverted to the adjoining landowners upon abandonment by the railroad, the railroad could not convey the easement to the state for trail use.⁶⁶ The court acknowledged the power of Congress and the legislature to provide for multiple uses of rights-of-way. It rejected, however, the rationale that the easement remained intact because recreational trail use still constituted public transportation.⁶⁷

Likewise, courts dealing with easements explicitly limited by statutes or contracts to railroad use have consistently held that conversions to trail use do constitute abandonments of the rights-of-way.⁶⁸ In *Lawson v. State*, the Supreme Court of Washington held that owners of reversions "have enforceable legal rights . . . which are protected under the takings provisions of our constitution."⁶⁹ This decision held that conversions without compensation, as authorized by section 64.04.190 of the Revised Code of Washington, violated the state constitution.⁷⁰

In *McKinley v. Waterloo Railroad Co.*, the Iowa Supreme Court also held that an easement, condemned for railroad purposes according to statute, was abandoned when the right-of-way was converted to trail use.⁷¹ The court distinguished this case from *Washington Wildlife Preservation* on the grounds

⁶⁴ This contrast was noted by a federal court of appeals in *National Wildlife Fed'n v. ICC*, 850 F.2d 694, 706 (D.C. Cir. 1988). A prescriptive easement is created by adverse, open and notorious, and continuous use of property during a statutory time period. RALPH E. BOYER, *SURVEY OF THE LAW OF PROPERTY* 569 (3d ed. 1981).

⁶⁵ *Pollnow v. State Dep't of Natural Resources*, 276 N.W.2d 738, 742 (Wis. 1979).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See *supra* text accompanying note 64.

⁶⁹ *Lawson v. State*, 730 P.2d 1308, 1315 (Wash. 1986). See also *King County v. Squire Inv. Co.*, 801 P.2d 1022, 1025 (Wash. Ct. App. 1990).

⁷⁰ *Lawson*, at 458, 730 P.2d at 1316. See also *infra* notes 102-03 and accompanying text.

⁷¹ *McKinley v. Waterloo R.R.*, 368 N.W.2d 131, 134-35 (Iowa 1985).

that the latter did not concern an easement specifically restricted to railroad purposes.⁷²

Similarly, in *Schnabel v. County of DuPage*, an Illinois appellate court rejected the rationale that because both trail and railroad uses were public uses, a rails-to-trails conversion did not constitute an abandonment.⁷³ The lower court reasoned that because the trail use was of "public character" and would not additionally burden the servient estates, an exception to normal abandonment standards was appropriate.⁷⁴ The appellate court noted, however, that "[n]o court in Illinois has recognized such an exception to the normal rule of abandonment and denied return of the use of the encumbered property to the grantor, his heirs, or assigns."⁷⁵

V. COMPARATIVE STATE STATUTES

A number of states have enacted their own versions of rails-to-trails statutes. As in other areas of legislation, the states have displayed a wide variety of approaches in dealing with this public policy issue.⁷⁶ Although many states utilize general recreational trails statutes, several states specifically provide for acquisition and use of railroad right-of-way. Some have even gone so far as to enact laws that mirror the federal Trails Act Amendments and its provisions for conversion of abandoned rights-of-way to interim trail use. Descriptions of a number of state recreational trail statutes follow.⁷⁷

A. State Rails-to-Trails Statutes

1. Maryland

In May 1990, the Maryland legislature enacted section 5-1010 of the Natural Resources Article, creating the Maryland Rails-to-Trails program.⁷⁸ This statute declared the public's interest in preserving railroad rights-of-way for recreational trail use and future railroad use.⁷⁹ Thus, the state created a "systematic and continuing statewide program of acquiring abandoned railroad corridor property."⁸⁰

⁷² *Id.* at 135.

⁷³ *Schnabel v. County of DuPage*, 428 N.E.2d 671, 678 (1981).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ MONTANGE, *supra* note 20, at 112.

⁷⁷ *See id.* at 130-32 for a list of many of these statutes.

⁷⁸ MD. CODE ANN., NAT. RES. § 5-1010 (Supp. 1991).

⁷⁹ *Id.* § 5-1010(a)(1)-(5).

⁸⁰ *Id.* § 5-1010(a)(5).

Under the statute, the Department of Natural Resources consults with government bodies, including the Department of Transportation, the State Railroad Administration, and local governments concerning possible trail usage.⁸¹ The Department of Natural Resources may also request that rights-of-way acquired by the Department of Transportation be used for trails.⁸² Furthermore, one provision permits acquiring property according to procedures set forth in the amended National Trails System Act.⁸³ The Office of Planning coordinates the activities of the relevant departments and agencies, as well as relations with the ICC.⁸⁴

2. Florida

Sections 260.011 to 260.018 of the Florida Statutes comprise a comprehensive plan entitled the Florida Recreational Trails System. Uses for the trails include hiking, bicycling, and horseback riding, as well as canoeing.⁸⁵ One of the legislation's major goals consists of connecting national, state, and local parks and forests. The acquisition of railroad rights-of-way comprises the primary means of constructing the trail system.⁸⁶ The Department of Natural Resources administers the trails system.⁸⁷

As part of the statewide trails system, section 260.0141 established the Florida Rails to Trails Program.⁸⁸ Unlike other properties, rights-of-way may be acquired regardless of the projected values of the trails.⁸⁹ Rights-of-way may be obtained through purchase or gift.⁹⁰ The statute, however, limits using eminent domain to curing title defects.⁹¹

The Division of Parks and Recreation bears much of the responsibility for the trail system. Crucial functions include ranking trail projects based on anticipated need and costs, keeping a current list of rights-of-way that have been or are soon to be abandoned, and providing this information to organizations and government agencies.⁹² The Division appoints members of an advisory body, the Florida Recreational Trails Council.⁹³ The Division also coordinates the activities of government bodies involved in trail system

⁸¹ *Id.* § 5-1010(b)(1).

⁸² *Id.* § 5-1010(c)(1).

⁸³ *Id.* § 5-1010(b)(3).

⁸⁴ MD. CODE ANN., STATE FIN. & PROC. § 5-402(g)(1) to (3) (Supp. 1991).

⁸⁵ FLA. STAT. ANN. § 260.012(1) (West 1991).

⁸⁶ *Id.* § 260.012(2).

⁸⁷ *Id.* § 260.012(3).

⁸⁸ *Id.* § 260.0141.

⁸⁹ *Id.* § 260.015(1)(c).

⁹⁰ *Id.* § 260.015(2)(a)-(b).

⁹¹ *Id.* § 260.015(1)(a).

⁹² *Id.* § 260.016(2).

⁹³ *Id.* § 260.016(1)(e).

development.⁹⁴ The Department of Transportation, which must permit interim trail use on its rights-of-way whenever possible, actively cooperates with the Division.⁹⁵

B. State Recreational Trails Statutes with Explicit Provisions for the Use of Railroad Rights-of-Way

1. Ohio

Section 1519.01 of the Ohio Revised Code gives the director of the Department of Natural Resources the responsibility for planning and administering the state's trails system. The legislation emphasizes connecting trails among recreational and historical locations.⁹⁶

Section 1519.02 permits the director to acquire property for use as recreational trails. Two provisions, though, limit this power. First, the statute limits acquisitions to land "along a canal, watercourse, stream, existing or abandoned road, highway, street, logging road, [or] railroad . . ."⁹⁷ Second, no more than twenty-five acres of land per mile of trail may be acquired, and permissible trail uses exclude motorized vehicles. The director, however, has the power to transfer the land to other units of government and reach agreements with private organizations to facilitate trail maintenance.⁹⁸

2. Minnesota

Section 84.029 of the Minnesota Statutes gives the Commissioner of Natural Resources the responsibility of developing and administering recreational trails and canoe routes.⁹⁹ Land may be obtained by gift, purchase, or lease. This authority limits acquisitions to purposes such as connecting existing trails or concurrent vehicular use, but this limitation does not apply to acquiring abandoned railroad rights-of-way.¹⁰⁰ Unlike many states, statutes enacted by the legislature largely determine trail locations.¹⁰¹

⁹⁴ *Id.* § 260.016(1)(d).

⁹⁵ *Id.* § 260.0161

⁹⁶ OHIO REV. CODE ANN. § 1519.01 (Anderson 1990).

⁹⁷ *Id.* § 1519.02.

⁹⁸ *Id.*

⁹⁹ MINN. STAT. ANN. § 84.029 (Subdivision 2) (West 1977).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* § 85.015 (West 1977 & Supp. 1992).

3. *Washington*

The Washington legislature, in section 64.04.180 of the Revised Code of Washington, articulated the state's interest in preserving railroad rights-of-way as "public utility and transportation corridors."¹⁰² In 1988, both sections 64.04.180 and 64.04.190 were amended not to preclude constitutionally required compensation.¹⁰³ This action by the legislature was taken in response to *Lawson v. State*, in which the Supreme Court of Washington held that a rails-to-trails conversion violated the state constitution when the owners of the reversionary interests were not compensated.¹⁰⁴

The provisions regarding the development of walking, bridle, and bicycle paths display the importance placed on the trail system. For example, a trail must be rebuilt if the construction of a highway would interfere with its use.¹⁰⁵ Expending highway and road funds for trails and paths provides critical funding.¹⁰⁶ Indeed, cities and counties must generally spend at least one-half percent of motor vehicle tax receipts for trails and paths.¹⁰⁷

4. *Iowa*

Section 111F.2 of the Iowa Code gives the Department of Transportation the responsibility to plan "the acquisition, development, promotion, and management of recreational trails throughout the state."¹⁰⁸ The Iowa legislature gives priority to acquiring property, which completes other trails, uses railroad rights-of-way, and accommodates a number of uses (including transportation and utilities).¹⁰⁹

5. *New York*

Section 3.09 of the New York Parks, Recreation and Historic Preservation Law gives a Commissioner the authority to implement the statewide trail system.¹¹⁰ Abandoned railroad rights-of-way may be purchased with funds appropriated by the legislature for this purpose.¹¹¹

¹⁰² WASH. REV. CODE ANN. § 64.04.180 (West 1991).

¹⁰³ 1988 WASH. LAWS ch. 16 § 1.

¹⁰⁴ See *supra* notes 69–70 and accompanying text.

¹⁰⁵ WASH. REV. CODE ANN. § 47.30.010(3).

¹⁰⁶ *Id.* § 47.30.060.

¹⁰⁷ *Id.* § 47.30.050(1).

¹⁰⁸ IOWA CODE ANN. § 111F.2.1 (West 1991).

¹⁰⁹ *Id.* § 111F.2.3.

¹¹⁰ N.Y. PARKS REC. & HIST. PRES. LAW § 3.09 (McKinney 1984).

¹¹¹ *Id.*

6. Wisconsin

The Wisconsin Department of Transportation, which has the right of first acquisition, controls the disposition of abandoned railroad rights-of-way. This property may be acquired by purchase, gift, or even eminent domain.¹¹² The potential for future rail and other transportation uses constitutes the key factor in acquiring this land. Nonetheless, the statute provides for land transfers to another government body for "recreational purposes."¹¹³

C. State Recreational Trails Statutes Without Explicit Provision for Use of Rights-of-Way

Some states that have enacted recreational trails statutes do not mention the use of abandoned railroad rights-of-way by name. Nonetheless, conversion for interim trail use can play an important part in the statewide trail plan. Some examples follow.

1. California

Article 6 of the Public Resources Code enacted the wide-ranging and ambitious California Recreational Trails System.¹¹⁴ Implementing this "statewide system of recreational and interpretive trails" includes encouraging other government bodies and private groups to get involved in trail development.¹¹⁵ The director of this system develops and updates a plan that assesses present and future needs and which emphasizes trails linked to traverse a number of "scenic, natural, historic, and recreational areas of statewide significance."¹¹⁶

Funding priorities in the statute complement the efforts of the rails-to-trails movement. Railroad lines have served as a major transportation link among metropolitan areas. As such, a priority in funding trails accessible to urban areas would aid in preserving abandoned rights-of-way for trail use.¹¹⁷ Additionally, trails receive priority if they involve "other public agencies, cooperating volunteer trail associations, or any combination of those entities, in state trail acquisition, development, or maintenance."¹¹⁸ This provision mirrors one in the federal rails-to-trails statute.

¹¹² WIS. STAT. ANN. § 85.09(2) (West 1990).

¹¹³ *Id.* § 85.09(4).

¹¹⁴ CAL. PUB. RES. CODE § 5070 (West 1984).

¹¹⁵ *Id.* § 5070.5(f), (h).

¹¹⁶ *Id.* § 5070.7(b).

¹¹⁷ *Id.* § 5075.3(a)(1).

¹¹⁸ *Id.* § 5075.3(a)(4).

Responding to objections similar to those raised by opponents of interim trail use, California's trail statute protects adjoining land owners to a greater extent than do most other states. Under the California statute, evaluation of trail routes must include consideration of the impact on the landowners.¹¹⁹ Trails are also to be located so as to minimize adverse impacts on the landowners.¹²⁰ Most importantly, fences are required to be installed along a trail if requested by an adjoining landowner.¹²¹

2. Kentucky

The Department of Parks administers the Kentucky Trails System.¹²² Cooperation with the federal government plays an important part in the job of administration. In fact, section 148.770 of the Kentucky Revised Statutes encourages the incorporation of state trails into the system of national trails.¹²³ The Kentucky legislature mandated that this support for trail development, though, should be balanced by efforts to minimize negative impacts on land owners.¹²⁴

VI. *PRESEALT V. ICC* IN PERSPECTIVE

The Supreme Court's decision in *Preseault* helped clarify the decisions of three federal circuit courts that specifically addressed the takings question presented by the 1983 Amendments to the National Trails System Act. The Court affirmed the Second Circuit's holding as to Congress' power under the Commerce Clause and the availability of a Tucker Act remedy.¹²⁵ The Court did not, however, accept the Second Circuit's position that the ICC's authority, rather than state law, determined the property rights at issue.¹²⁶

The Supreme Court's holding in *Preseault* also confirmed the Eighth Circuit's ruling that the rails-to-trails amendments were a valid exercise of the commerce power.¹²⁷ The Eighth Circuit, as did the Second Circuit, held that compensation could be obtained for takings pursuant to the Tucker Act.¹²⁸

¹¹⁹ *Id.* § 5075.7 (West Supp. 1992).

¹²⁰ *Id.* § 5075.3(d).

¹²¹ *Id.* § 5075.3(i).

¹²² KY. REV. STAT. ANN. § 148.750 (Michie/Bobbs-Merrill 1987).

¹²³ *Id.* § 148.770.

¹²⁴ *Id.* § 148.670(1).

¹²⁵ *Preseault v. ICC*, 494 U.S. 1, 4-5 (1990), *aff'g* 853 F.2d 145 (2d Cir. 1988).

¹²⁶ *See supra* notes 49-52 and accompanying text.

¹²⁷ *Glosemeyer v. Missouri-Kan.-Tex. R.R.*, 879 F.2d 316, 322 (8th Cir. 1989).

¹²⁸ *Id.* at 325.

Finally, *Preseault* affirmed a District of Columbia Circuit's holding, which recognized the primacy of state law in determining property rights.¹²⁹ The circuit court emphasized this point by remanding the case to the ICC to reconsider its position that the 1983 Amendments would never result in a taking requiring compensation.¹³⁰ The court declared that "the Commission cites no authority for the proposition that government action that precludes the vesting of a reversionary interest does not constitute a taking of property."¹³¹

After remand, the ICC changed its position on the takings question, as reflected in its Policy Statement on Rails-to-Trails Conversions, which was decided January 29, 1990. The pertinent portion is as follows:

2. Compensation is available to holders of reversionary property interests. The most difficult and controversial issue facing us under the Trails Act has related to reversionary property interests. In our rules we initially took the position that the interests of adjacent or reversionary landowners never require protection or compensation under the Fifth Amendment because an interim trail use arrangement is only a temporary postponement of the vesting of reversionary interests. . . .

. . . We did not attempt to establish the parameters for when a compensable taking occurs, since procedures are available under the Tucker Act (28 U.S.C. 1491) to address any taking claims that landowners might have. We emphasized that the Claims Court has the expertise to decide takings questions and is in the best position to do so.¹³²

The full impact of the Court's decision in *Preseault* has yet to be felt. A hint as to the future of trail conversion litigation, though, arose in *Goos v. Interstate Commerce Commission*, the first federal post-*Preseault* case interpreting the Trails Act Amendments.¹³³ Following *Preseault*'s rejection of the unconstitutional takings challenge, the landowners dropped similar claims.¹³⁴ In *Goos*, the Eighth Circuit then rejected the claim that the ICC was required to consider the environmental impact of a conversion to trail use in deciding whether to permit this conversion.¹³⁵

This court accepted the ICC's position that it exercises extremely little discretion in rails-to-trails conversions because Congress had already decided

¹²⁹ *National Wildlife Fed'n v. ICC*, 850 F.2d 694, 703 (D.C. Cir. 1988).

¹³⁰ *Id.* at 708.

¹³¹ *Id.* at 704.

¹³² *Policy Statement*, *supra* note 25.

¹³³ *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990).

¹³⁴ *Id.* at 1287-88.

¹³⁵ *Id.* at 1297. The ICC took the position that the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (1988), only required an environmental impact evaluation of the proposed abandonment itself. *Id.* at 1287.

that all trails were worth preserving through rail banking.¹³⁶ Using that reasoning, the ICC previously decided that the Trails Act Amendments did not permit it to force a conversion to interim trail use if the parties were not willing. The ICC extended this idea to preclude it from blocking a voluntary trail conversion agreement.¹³⁷ Because the ICC's "ministerial" role involved such limited discretion, the court held that the environmental impact of trail conversions did not have to be evaluated.¹³⁸ As Judge Beam noted, "[I]t would make little sense to force the I.C.C. to consider factors which cannot affect its decision" ¹³⁹

This decision, which reiterated the ICC's limited powers regarding trail conversions, presented rails-to-trails advocates with a significant victory. Previously, *Connecticut Trust for Historic Preservation v. Interstate Commerce Commission* upheld the ICC's interpretation of its own powers as precluding the ICC from forcing unwilling parties to make trail conversions.¹⁴⁰ Proponents of interim trail use derided the ICC's interpretation as "[n]arrow and [u]nreasonable" and saw the Second Circuit's decision as a major defeat.¹⁴¹ The decision in *Goos* showed that this construction of the statute is a two-edged sword, in that adjoining landowners similarly cannot use the ICC to block a voluntary interim trail-use agreement.

VII. POLICY CONSIDERATIONS

The rails-to-trails debate has produced some unusual alliances. On one side are government agencies, trail operators and users (such as hikers and bicyclists), conservation groups, and historic preservation organizations.¹⁴² On the other side are land developers, ranchers, and farmers.¹⁴³ Both sides start from different premises regarding the need, means, and underlying philosophy connected with the conversion of railroad rights-of-way to interim trail use.

A. Government Regulation vs. Taking of Property

The first point of contention whether interim trail use constitutes traditional government regulation or a taking of property. Trail advocates contend that a

¹³⁶ *Id.* at 1295.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1295-96.

¹³⁹ *Id.* at 1296.

¹⁴⁰ *Connecticut Trust for Historic Preservation v. ICC*, 841 F.2d 479, 482 (2d Cir. 1988).

¹⁴¹ MONTANGE, *supra* note 20, at 39.

¹⁴² Brief of Rails-to-Trails Conservancy at 2, *Preseault v. ICC*, 494 U.S. 1 (1990) (No. 88-1076) [hereinafter RTC Brief].

¹⁴³ David Burwell, *Unanimous!*, TRAILBLAZER, Apr.-June 1990, at 2.

right-of-way is a "public highway," much like a limited access highway for automobile use.¹⁴⁴ They observe that under the common law, public highways have historically been subject to government regulation.¹⁴⁵ In particular, railroads have long been regulated in the United States under the Commerce Clause.¹⁴⁶

Proponents make two arguments as to why trail conversions are merely regulatory actions. First, trail conversions resemble ICC orders that delay abandonments and require railroad service to continue, both of which postpone the vesting of reversionary interests.¹⁴⁷ Second, because Congress could have constitutionally preserved rights-of-way through means such as requiring railroads to continue service or purchasing the land outright, less burdensome means of preserving rights-of-way should be permissible.¹⁴⁸ Interim trail use helps to preserve presently uneconomical rights-of-way for future use by shifting costs from the railroads to the trail operators.¹⁴⁹ As such, the Trails Act Amendments are a "reasonable regulation" to achieve the goal of providing for this future use.¹⁵⁰ This line of reasoning would not only preclude compensation to adjoining landowners holding reversionary interests but would also preclude compensation to railroads holding fee simple interests.¹⁵¹

Trail opponents, though, do not accept this reasoning. They point out that the easements were designated for specific purposes when the railroads obtained the rights-of-way. Specifically, the railroads acquired the rights-of-way in their capacity as public utilities.¹⁵² Trail conversions do not constitute mere regulation of railroads or public transportation. Rather, trail conversions closely resemble the traditional use of governmental power to take land for roads and highways, which requires landowner compensation. Thus, compensation must be paid to landowners in instances of trail conversions.

¹⁴⁴ Brief Amici Curiae Iowa Ass'n County Conservation Bds. at 17-18, *Preseault v. ICC*, 494 U.S. 1 (1990) (No. 88-1076) [hereinafter Iowa Ass'n Brief].

¹⁴⁵ Brief in opposition at 7, *Preseault v. ICC*, 494 U.S. 1 (1990) (No. 88-1076) (citing 3 JULIUS L. SACKMAN & PATRICK J. ROHAN, *NICHOLS ON EMINENT DOMAIN* § 9.33[2] (3d ed. 1985)).

¹⁴⁶ *Preseault v. ICC*, 494 U.S. 1, 19 (1990) (citing *Colorado v. U.S.*, 271 U.S. 153 (1926)).

¹⁴⁷ RTC Brief, *supra* note 142, at 20-21.

¹⁴⁸ *Id.* at 22.

¹⁴⁹ Iowa Ass'n Brief, *supra* note 144, at 5, 13.

¹⁵⁰ *Id.* at 10.

¹⁵¹ Charles H. Montange, *Converting About-to-be Abandoned Railroad Rights-of-Way to Recreational Trails*, RIGHT OF WAY, October 1986, at 7.

¹⁵² Telephone conversation with Robert E. Bash, Director of Public Affairs for the Ohio Farm Bureau (January 31, 1991).

B. *Public Use vs. Abandonment*

The second point of disagreement concerns whether trail conversion constitutes an abandonment. Proponents view both railroads and trails as forms of public transportation and, as such, give a broad construction as to appropriate uses of railroad rights-of-way.¹⁵³ Because a right-of-way, as a public highway, is capable of a number of public uses consistent with its terms, trail advocates contend that no additional compensation to the reversionary interest owner is necessary. They see requiring additional compensation as paying twice for a property interest that was paid for when the right-of-way was acquired originally.¹⁵⁴

Opponents counter that railroad use is a special purpose which is unlike recreational trail use.¹⁵⁵ Abandonment of a railroad right-of-way triggers the reversionary interests of adjoining landowners. After the conclusion of railroad service, adjoining landowners assumed that the land would return to them.¹⁵⁶ They thus oppose legislation, such as the Trails Act Amendments, which interferes with the operation of reversionary rights.¹⁵⁷ As such, trail conversions constitute a second and distinct taking of the property, requiring compensation under the Fifth Amendment.

C. *Nominal vs. Full Compensation*

The third main argument concerns the compensation due a landowner if it is determined that a taking of property has occurred. Proponents claim that whether the interest acquired in a railroad right-of-way was an easement or fee simple is irrelevant. Because the easement was acquired for an indefinite period, compensation was set at the same amount as if a fee simple interest were acquired.¹⁵⁸ Indeed, landowners should realize that reversions are subject to extensive government regulation, one of whose purposes is to prevent the extinguishment of easements suitable for public uses.¹⁵⁹ Thus, the value of the reversion would be nominal.

¹⁵³ RTC Brief, *supra* note 142, at 27.

¹⁵⁴ Brief in Opposition, *supra* note 145, at 15.

¹⁵⁵ Bash, *supra* note 152.

¹⁵⁶ *Id.*

¹⁵⁷ AMERICAN FARM BUREAU FEDERATION, FARM BUREAU POLICIES FOR 1990: RESOLUTIONS ON NATIONAL ISSUES, 81 (1990).

¹⁵⁸ RTC Brief, *supra* note 142, at 3–4. *See, e.g.,* People *ex rel.* Dep't of Pub. Works v. City of Fresno, 26 Cal. Rptr. 853, 862–63 (1963) (The court held that the possibility of reversion in the indefinite future “was of such a nebulous nature that it had no legally estimable market value.”).

¹⁵⁹ Iowa Ass'n Brief, *supra* note 144, at 15.

Opponents counter that they should be paid market value for the property. In particular, they dispute proponents' claims regarding the valuation of the reversionary interests. They believe that the easements were practically "given" to the railroads with the understanding that the land would someday revert to the landowners.¹⁶⁰ Compensation for easements thus did not approach that of fee simple interests. Thus, compensation for rails-to-trails conversions must be paid at the time they are made.¹⁶¹

D. *Negative vs. Positive Effects*

The fourth point of disagreement concerns the effects of trail use on the adjoining property. Opponents perceive the threat of lower property values when land lies along a recreational trail. They fear that an influx of trail users will lead to increased littering and trespassing. The lack of public facilities along many trails also presents a nuisance threat to adjoining properties.¹⁶² Opponents thus call for strict enforcement of trespass laws along trails.¹⁶³

Proponents, on the other hand, cite reports of government agencies showing increased property values and no increase in litter or crime for land adjoining already established trails.¹⁶⁴ If the latter holds true for trails in general, not only would the trails be "good neighbors," but costs associated with landowners' claims for damages would also be minimized.¹⁶⁵

E. *Private Ownership vs. Public Function*

The fifth conflict has its roots in a general disagreement over the proper role of government in a free society. Opponents note that the vast landholdings of the federal government conflict with notions of private ownership and the free enterprise system.¹⁶⁶ They also contend that using the immense and coercive power of government to develop recreational trails undermines private

¹⁶⁰ Bash, *supra* note 152.

¹⁶¹ Some landowners have demanded compensation beyond the value of the land itself. For example, some landowners in Missouri want \$5,000 per mile annually, based on their calculations as to the going rate for fiber optic leases. Charles H. Montange, *The Supreme Court Affirms the Federal Trail Use and Railbanking Statute*, RIGHT OF WAY, June 1990, at 14.

¹⁶² Bash, *supra* note 152.

¹⁶³ AMERICAN FARM BUREAU FEDERATION, *supra* note 157, No. 116.

¹⁶⁴ MONTANGE, *supra* note 20, at 139-40. Telephone interviews of public safety officials conducted by the Minnesota Department of Natural Resources and a trail study conducted by the Seattle Engineering Department comprise two of these reports. *Id.*

¹⁶⁵ Montange, *supra* note 161, at 14.

¹⁶⁶ AMERICAN FARM BUREAU FEDERATION, *supra* note 157, No. 25.

property rights.¹⁶⁷ Opponents object to the National Trails System Act precisely because it permits abandoned rights-of-way to be converted to recreational trails rather than revert to the adjoining landowners.¹⁶⁸

Trail proponents respond that much government-owned land is inappropriate for trail use and that providing for recreational needs is a traditional function of government.¹⁶⁹ Proponents also point to other purposes that may be simultaneously advanced by rails-to-trails conversions such as attracting businesses with potential resumption of rail service.¹⁷⁰ Additionally, organizations involved with environmental concerns note the preservation of wildlife habitats and prairie remnants as important effects of trail development.¹⁷¹

VIII. THE FUTURE OF RAILS-TO-TRAILS

By 1990, over 3100 miles of trails created from abandoned railroad rights-of-way had been developed.¹⁷² This mileage is the total from 242 trails in 34 states.¹⁷³ At this time, Washington and Illinois have the most total miles and largest number of these trails. Other leaders include Wisconsin, Michigan, Minnesota, California, Pennsylvania, and Iowa.¹⁷⁴ Interim trail use has thus become a significant recreational resource.

The ruling of a unanimous Supreme Court in *Preseault*, upholding the constitutionality of interim trail use, has given further impetus to the movement. Many trail conversions were put on hold pending a decision in the case.¹⁷⁵ After the decision, negotiations having the potential of adding another 1100 miles of trails were either started or completed.¹⁷⁶ Trail proponents thus exude optimism as a result of this decision. The president of the Rails-to-Trails Conservancy termed it "a very real turning point for the rails-to-trails

¹⁶⁷ *Federal Bills Affecting Property Rights*, Citizens to Preserve Property Rights Newsletter, May 1988, at 2.

¹⁶⁸ AMERICAN FARM BUREAU FEDERATION, *supra* note 157, No. 150.

¹⁶⁹ MONTANGE, *supra* note 20, at 140.

¹⁷⁰ Iowa Ass'n Brief, *supra* note 144, at 16. Proponents note that an Iowa trail occupies a railroad right-of-way intended to serve a planned coal-fired electric plant. *Id.* at 3.

¹⁷¹ *Id.* at 4.

¹⁷² *Rail-Trail Mileage Surges Past 3,100*, TRAILBLAZER, Apr.-June 1990, at 7.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Supreme Court: We Can Bank Them!*, TRAILBLAZER, Apr.-June 1990, at 1.

¹⁷⁶ *February Supreme Court Victory Spurs Movement to New Heights*, TRAILBLAZER, July-Sept. 1990, at 1.

movement."¹⁷⁷ In addition, the publicity obtained from press coverage of the case has helped to raise awareness of this issue among the general public.¹⁷⁸

A. *Litigation Prospects*

Settling the constitutionality of rails-to-trails conversions does not mean that all relevant issues have been settled or that trail development will henceforth go on unimpeded. The Fifth Amendment may still, depending on state property law, require compensation for some trail conversions. Indeed, *Preseault's* concurring opinion, written by Justice O'Connor, stressed that the Court's holding did not preclude compensation for a trail conversion.¹⁷⁹

Opponents will also continue to use legal and procedural challenges that may discourage interim trail uses of rights-of-way. One example is engaging in litigation under the Tucker Act in attempts to obtain large compensation awards.¹⁸⁰ Another example is seeking additional reporting requirements to which trail operators or railroads must conform.¹⁸¹ Whether or not the landowners' requests for compensation and regulatory safeguards are legitimate or are attempts to block trail uses entirely, their challenges will impede trail development to some extent.

B. *Political Prospects*

With the constitutionality question decided, most of the conflict will probably move to the legislative arena. As shown by the alignment of groups that filed amicus curiae briefs in *Preseault*, coalitions supporting or opposing trail conversions have formed.¹⁸² Some coalitions, such as those between land developers and farmers, pair traditional enemies. This coalition building, nonetheless, continues. Trail-use proponents are already attempting a political alliance with the railroad industry. A "broad coalition" of trail supporters, including the Rails-to-Trails Conservancy, is promoting transportation alternatives to automobiles. It has also decided to support policies to make railroads more competitive with trucking.¹⁸³ Forming alliances with utilities and pipeline companies to support trail conversions are sought. This is to be

¹⁷⁷ Burwell, *supra* note 143, at 2.

¹⁷⁸ *Id.*

¹⁷⁹ *Preseault v. ICC*, 494 U.S. 1, 23 (1990) (O'Connor, J., concurring).

¹⁸⁰ Montange, *supra* note 161, at 14.

¹⁸¹ *Rail Abandonments—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures*, ICC, May 18, 1989, available in WL FTRAN-ICC Database.

¹⁸² See *supra* notes 142-43 and accompanying text.

¹⁸³ David Burwell, *Preseault, Part II: Transportation*, TRAILBLAZER, July-Sept. 1990, at 2.

accomplished by pointing out that interim trail use will help to preserve those corridors with which those companies are concerned.¹⁸⁴

IX. CONCLUSION

Both the Supreme Court and the ICC have kept the door open as to compensation for rails-to-trails conversions. The Commission acknowledged that compensation may be required under the Fifth Amendment. Likewise, the Court held that landowners should pursue any compensation claims in the Claims Court.¹⁸⁵

A. *Dual Purposes of the Trails Act Amendments*

The center of the controversies concerns the permissible uses of a railroad easement. If trail use concerns an easement, the issue of compensation does not arise at all. Some flexibility is needed to deal with changes in technology and circumstances and can be accommodated by traditional property laws dealing with railroad easements. For example, a railroad easement obtained when coal-fired locomotives were in use would not preclude its use by diesel locomotives. Similarly, a railroad line originally used to haul freight could later be used for commuter light-rail transportation.

At some point, though, the use becomes so dissimilar that the property has been taken for another use. Arguments that railroad and recreational trail uses are both "public uses" and so are necessarily within an easement's terms appears to be stretching words a bit.¹⁸⁶ If recreation were the only purpose of a rails-to-trails conversion, an abandonment of the railroad easement would seem to follow.

The transportation aspect of interim trail use, however, complicates the analysis. The federal Trails Act Amendments, as well as many similar state statutes, declare the objective of preserving railroad corridors for future resumption of rail service. In this light, trail conversions look more like the present use of public resources to accommodate future needs.¹⁸⁷

In deciding whether a taking of property requiring compensation has occurred, different approaches could be taken. Legislative and judicial decisions could focus on which property use predominates—recreation or future

¹⁸⁴ Montange, *supra* note 161, at 12.

¹⁸⁵ For a general discussion of pre-*Presault* controversies, see generally Thomas A. Duda, Comment, *The Use of Discontinued Railroad Rights-of-Way as Recreational Hiking and Biking Trails: Does the National Trails System Act Sanction Takings?*, 33 ST. LOUIS U. L.J. 205 (1988); Thomas A. Jones, Comment, *Rails to Trails: Converting America's Abandoned Railroads Into Nature Trails*, 22 AKRON L. REV. 645 (1989).

¹⁸⁶ See *supra* note 155 and accompanying text.

¹⁸⁷ See *supra* notes 148-50 and accompanying text.

rail use. Allocating the value of the property interests between these uses could also be used to determine compensation for a partial taking. If a taking of property occurs, the amount of compensation likely hinges on the compensation paid for the right-of-way initially. That is, whether the compensation for a railroad easement was nominal or close to amounts paid for fee simple interests.¹⁸⁸

B. Proposed Changes to the Trails Act Amendments

In order to balance the interests of the general public and the landowners, a number of changes should be made to the Trails System Amendments. First, trail conversions should be made on a selective basis, instead of the Trails Act Amendments' blanket premise that all rights-of-way are worth preserving. Government agencies should decide which rights-of-way are suitable for recreational trail use or future railroad transportation needs and permit the remainder to revert to the adjoining landowners.¹⁸⁹

Second, specific appropriations amounts should be included in the federal budget, instead of the present system under which Claims Court litigation awards undetermined compensation amounts.¹⁹⁰ Establishing a specific funding level helps people, through their representatives, to decide clearly how many trails are worth the costs involved. Under the present procedure, the costs of interim trail use is hidden, and compensation costs are unpredictable.

Third, government agencies and private groups promoting trail use should cooperate with adjoining landowners in converting rights-of-way to interim trail use. Proponents must be willing to work on minimizing adverse effects on property lying along trails.¹⁹¹ Measures include providing fencing and restroom facilities along trails when necessary.¹⁹² In return, adjoining landowners should refrain from making unfounded and exaggerated claims which are merely intended to impede trail development.

Fourth, additional research must be done on the impact and use of trail conversions. Proponents and opponents disagree on the effects recreational trails have on matters such as property values and crime rates. Present

¹⁸⁸ See *supra* notes 158-61 and accompanying text.

¹⁸⁹ Establishing standards for evaluating the feasibility and demand for potential rails-to-trails conversions is a realistic objective. A set of criteria already applies to the selection of potential national historic and scenic trails. 16 U.S.C. § 1244(b) (1988).

¹⁹⁰ See *supra* notes 45-48 and accompanying text.

¹⁹¹ Prior to passage of the Trail Act Amendments, Senator Domenici described the problems caused by persons wandering off national trails. He believed that both damage to adjoining property and lawsuits against landowners for personal injuries would be adequately handled by the Amendment. 129 CONG. REC. S956 (daily ed. Feb. 3, 1983) (statement of Sen. Domenici). This assessment, however, now seems overly optimistic.

¹⁹² See, e.g., CAL. PUB. RES. CODE § 5075.3(h), (i) (West 1984); KY. REV. STAT. ANN. § 148.630(1) (Michie/Bobbs-Merrill 1987).

information on these matters largely consists of anecdotal evidence and isolated studies of individual trails.¹⁹³ Better information would help settle these disputes and provide guidance in shaping the trail system to accommodate these diverse interests.

Whatever doctrines are adopted at the federal and state levels, rails-to-trails conversions will generate more than scholarly debate. Increased litigation as to compensation for public-use takings awaits us. These litigation costs, along with any actual compensation costs, will make the conversion of railroad rights-of-way to recreational trails less attractive and more expensive.

Despite the significant costs of compensation and litigation, the Fifth Amendment protects property from being taken for public use without just compensation. The interests of adjoining landowners, trail users, and the general public must all be considered. This includes giving all concerned a fair hearing, whether taking the form of policy arguments for legislation or legal claims for judicial relief. Interim trail use is a good idea, as it provides for both recreational and transportation needs. Trail enthusiasts must still take care not to let the advocacy of their cause blind them from giving compensation when property is appropriated for public purposes. Adjoining landowners must also be protected from property damage and legal liability likely to result from trail use. Because interim trail use benefits society at large, select individuals should not be made to bear the entire burden of costs and inconveniences. As such, the principles of the Constitution are not to be compromised in the name of either convenience or financial exigency.

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¹⁹³ See *supra* note 164 and accompanying text.

* I would like to thank John Wengert and Mary Hess of the Rails-to-Trails Conservancy and Robert E. Bash of the Ohio Farm Bureau for providing materials explaining their respective policy positions.

